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## Prosecuting Crimes Against Humanity: The Lessons of World War I

David Matas\*

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# Prosecuting Crimes Against Humanity: The Lessons of World War I

David Matas

## **Abstract**

In Part I, this Article examines legal responses to crimes against humanity during World War I and World War II. Part II considers the various sources of international law that recognized crimes against humanity prior to World War I. In Part III, this Article examines Canada's assertion of jurisdiction over crimes against humanity. This Article concludes that those who have committed crimes against humanity during World War II must be punished in order to deter the commission of crimes against humanity in the future.

# PROSECUTING CRIMES AGAINST HUMANITY: THE LESSONS OF WORLD WAR I†

*David Matas\**

## INTRODUCTION

World War I was a premonition of World War II. The combatants were, by and large, the same, the quarrels were similar, and even the wartime atrocities bore a haunting resemblance to each other. World War I saw the Armenian massacre—the Turkish murder of hundreds of thousands of Armenian men, women, and children and the attempt to exterminate all Armenians within the boundaries of the Ottoman empire.<sup>1</sup> World War II saw the Holocaust—the Nazi extermination of approximately six million Jews and the attempt to exterminate even more.<sup>2</sup>

The responses to the two genocides also began in the same way. As the atrocities became known, the victors in both wars stated that they would punish the perpetrators. Yet, no assertive legal action was taken in the aftermath of World War I. It was not until after World War II that the international community united in condemning crimes against humanity. These crimes had been tolerated through lack of prosecution throughout history. The lesson learned is that unless crimes against humanity are vigorously prosecuted they are destined to be repeated. In Part I, this Article examines legal responses

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\* B.A., Juris. (Oxon.), 1964; B.C.L. (Oxon.), 1965; Senior Counsel to the League for Human Rights of B'nai B'rith Canada.

1. See CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 32, VIOLATION OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES FOR THE CONFERENCE OF PARIS, 1919 [hereinafter REPORT]. The Report states that the massacres of Armenians by the Turks was systematically organized with German complicity. In addition, it states that more than 200,000 Armenians were killed between 1914 and 1918. *Id.* Annex I, at 30.

2. See R. Conot, JUSTICE AT NUREMBURG xii (1983).

to crimes against humanity during World War I and World War II. Part II considers the various sources of international law that recognized crimes against humanity prior to World War I. In Part III, this Article examines Canada's assertion of jurisdiction over crimes against humanity. This Article concludes that those who have committed crimes against humanity during World War II must be punished in order to deter the commission of crimes against humanity in the future.

## I. LEGAL RESPONSES TO CRIMES AGAINST HUMANITY

### A. World War I: Treaty of Sèvres

During World War I, on May 28, 1915, Britain, France, and Russia charged the Ottoman government with massacres of Armenians and declared that they would hold responsible all the members of the Turkish government as well as those officials who had participated in the massacre.<sup>3</sup>

After World War I, the Allies began making plans to follow up on that commitment. At the second plenary session of the Paris Peace Conference, held on January 25, 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (the "Commission of Fifteen") was appointed to inquire into and report upon the violations of international law committed by Germany and its allies during the course of the war.<sup>4</sup> Having been unable to

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3. Armenian Memorandum presented by the Greek delegation to the Commission of Fifteen of March 14, 1919, *reprinted in* Schwelb, *Crimes Against Humanity*, 1946 BRIT. Y.B. INT'L L. 178, 181 [hereinafter Schwelb].

4. See REPORT, *supra* note 1, Introductory Note by James Brown Scott, technical delegate of the United States; see also B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE 169 (1980). The Commission of Fifteen was charged to inquire into and report upon the following points:

1. The responsibility of the authors of the war.
2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed.
4. The constitution and procedure of a tribunal appropriate for the trial of these offences.
5. Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission finds it useful and relevant to take into consideration.

reach conclusions acceptable to all of its members on all subjects submitted to its consideration, the Commission of Fifteen presented a report on March 29, 1919 (the "Report") and included therein the dissenting reports of the U.S. and Japanese members.<sup>5</sup>

In the Report, the Commission of Fifteen concluded that the enemy powers had carried on the war by barbarous or illegitimate methods in violation of the elementary laws of humanity.<sup>6</sup> The Report stated that all persons belonging to enemy countries who had committed offenses against the laws of humanity were subject to criminal prosecution.<sup>7</sup>

An annex of the Report contained a summary table of offenses committed by the enemy powers during the war.<sup>8</sup> In

*Id.* at 1.

5. See REPORT, *supra* note 1, Introductory Note by James Brown Scott, technical delegate of the United States.

6. *Id.* at 19.

7. *Id.* at 20.

8. *Id.* Annex I, at 28.

The non-exhaustive list enumerates the following offenses:

1. Murders and massacres; systematic terrorism;
2. Putting hostages to death;
3. Torture of civilians;
4. Deliberate starvation of civilians;
5. Rape;
6. Abduction of girls and women for the purpose of enforced prostitution;
7. Deportation of civilians;
8. Internment of civilians under inhuman conditions;
9. Forced labour of civilians in connection with the military operations of the enemy, and otherwise;
10. Usurpation of sovereignty during military occupation;
11. Compulsory enlistment of soldiers among the inhabitants of occupied territory;
12. Attempts to denationalise the inhabitants of occupied territory;
13. Pillage;
14. Confiscation of property;
15. Exaction of illegitimate or of exorbitant contributions and requisitions;
16. Debasement of the currency, and issue of spurious currency;
17. Imposition of collective penalties;
18. Wanton devastation and destruction of property;
19. Deliberate bombardment of undefended places;
20. Wanton destruction of religious, charitable, educational, and historic buildings and monuments;
21. Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew;

that list were crimes committed by Germany against its allies, and crimes committed by the Ottoman authorities against its own citizens. The list also noted the massacre of the Armenians<sup>9</sup> as well as the massacre and expulsion of Greeks from Turkey.<sup>10</sup>

The U.S. members of the Commission of Fifteen, headed by Robert Lansing and James Brown Scott, wrote a dissenting report that focused on the Commission's use of the phrase "laws of humanity."<sup>11</sup> The U.S. had not been part of the declaration of intent of May 1915 signed by Britain, France, and Russia and felt no obligation to honor it. To the U.S. members, the phrase "laws of humanity" meant nothing because, as they argued, there were no such laws.<sup>12</sup>

The U.S. members argued that "war is by its very nature inhuman,"<sup>13</sup> and any judicial tribunal that would deal with vio-

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- 22. Destruction of fishing boats and of relief ships;
  - 23. Deliberate bombardment of hospitals;
  - 24. Attack on and destruction of hospital ships;
  - 25. Breach of other rules relating to the Red Cross;
  - 26. Use of deleterious and asphyxiating gases;
  - 27. Use of explosive and expanding bullets, and other inhuman appliances;
  - 28. Directions to give no quarter;
  - 29. Ill-treatment of prisoners of war;
  - 30. Employment of prisoners of war on unauthorised works;
  - 31. Misuse of flags of truce; [and]
  - 32. Poisoning of wells.

*Id.*

9. *Id.* Annex I, at 30.

10. *Id.* Annex I, at 30, 35.

11. *Id.* Annex II, Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, April 4, 1919. It was the belief of the U.S. Representatives that the Commission of Fifteen went beyond the terms of its mandate by declaring that the facts found and the acts committed were in violation of the laws *and* of the principles of humanity. *See id.* at 64 (emphasis added). The U.S. Representatives, therefore, objected to the references in the report to the laws and principles of humanity in the context of what they believed was meant to be a judicial proceeding, as, in their opinion, the facts found were to be violations or breaches of the laws and customs of war. *Id.*

12. In the early meetings of the Commission of Fifteen, the U.S. members declared that there were two classes of responsibilities—those of a legal nature and those of a moral nature. The U.S. members further asserted that although legal offenses were justiciable and subject to trial and punishment by appropriate tribunals, moral offenses, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure and subject only to moral sanctions. *See id.* Annex II, at 58-59.

13. *Id.* Annex II, at 73.

lations of existing law committed during World War I must leave to another forum infractions of moral law.<sup>14</sup> To the U.S. members, the laws of humanity were notions of morality, not legal norms. Moreover, the concept of laws of humanity was too vague to have the character of law.<sup>15</sup> The dissenting U.S. members argued that there was no fixed and universal standard of humanity; rather, the standards of humanity varied according to place and circumstances.<sup>16</sup> If put before a court, the application of such standards might reflect only the conscience of the individual judge.<sup>17</sup>

As a result of the disagreement among the Commission of Fifteen, the main peace treaty following World War I, the Treaty of Versailles, contained nothing about crimes against humanity.<sup>18</sup> Because the Allies could not agree on whether to include language creating liability for such acts, the matter was dropped.

The Treaty of Sèvres (the "Treaty") was different.<sup>19</sup> That Treaty was the peace treaty with Turkey alone, to which the United States notably was not a party.<sup>20</sup> The Allies who did join that Treaty insisted that language imposing liability for crimes against humanity be included.<sup>21</sup> The Treaty, signed August 10, 1920, committed the Turkish government to hand over to the Allied Powers the persons who might have been responsible for the massacres committed during the war on Turkish territory.<sup>22</sup> The Allied Powers reserved the right to designate the tribunal that would try the accused.<sup>23</sup> The Turk-

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. See Treaty of Versailles, June 28, 1919, 13 AM. J. INT'L L. SUPP. 151, 16 AM. J. INT'L L. SUPP. 207, U.K.T.S. No. 4 (1919) (Cmd. 153), 3 Malloy 3329, 2 Bevans 43.

19. Treaty of Peace with Turkey, signed at Sèvres, August 10, 1920, U.K.T.S. No. 11 (1920) [hereinafter Treaty of Sèvres].

20. The following powers were party to the Treaty of Sèvres: The British Empire, France, Italy, and Japan (these four were described in the Treaty of Sèvres as the Principle Allied Powers) and Armenia, Belgium, Greece, the Hedjaz, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Czechoslovakia, and Turkey. See *id.* Preamble, at 4-6.

21. See Schwelb, *supra* note 3, at 181-82.

22. Treaty of Sèvres, *supra* note 19, art. 230, U.K.T.S. No. 11 (1920) at 51.

23. *Id.*

ish government undertook to recognize the tribunal.<sup>24</sup> The Treaty also provided that in the event the League of Nations created a tribunal competent to deal with the massacres, the Allied Powers reserved the right to bring the accused before such tribunal.<sup>25</sup> The Turkish government undertook equally to recognize that tribunal.<sup>26</sup>

The Treaty has four distinguishing features. First, the terms "crimes against humanity" and "laws of humanity" are not used. The Treaty assumes that there is an offense for which the perpetrators of the Armenian massacre would be tried. But it does not state what is the offense.<sup>27</sup>

Second, the Treaty established no specific mechanism for judging the accused, although the Treaty was signed two years after the war ended. A League of Nations tribunal was contemplated as a possibility.<sup>28</sup>

Third, the Treaty of Sèvres limits itself to massacres committed during the continuance of the war. Any atrocities committed before the war are outside the scope of the Treaty.<sup>29</sup>

Fourth, the jurisdiction of a tribunal to judge the crimes is not tacitly assumed; instead, there is a specific provision for it. The Treaty specifically provides that Turkey undertakes to recognize a tribunal designated to try the accused.<sup>30</sup> The implication is that, without the undertaking, Turkey would be under no obligation to submit to jurisdiction.

Although the Treaty of Sèvres envisioned the prosecution of those responsible for the war atrocities, the Allies never did designate a tribunal to try those accused of the Armenian massacres. Nor did the League of Nations create a tribunal competent to deal with the massacres. More important, however, the Treaty was never ratified, and it never came into force.<sup>31</sup>

There was eventually a peace treaty with Turkey that came

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24. *Id.*

25. *Id.*

26. *Id.*

27. Under the terms of the Treaty of Sèvres, the Turkish Government agreed to hand over to the Allied Powers all persons accused of having committed an act in violation of the laws and customs of war. See Treaty of Sèvres, *supra* note 19, art. 226, U.K.T.S. No. 11 (1920), at 51.

28. *Id.* art. 230, U.K.T.S. No. 11 (1920), at 51.

29. *Id.*

30. *Id.*

31. Schwelb, *supra* note 3, at 182.



into force. This was not the Treaty of Sèvres, but the Treaty of Lausanne of 1923.<sup>32</sup> This Treaty was silent on the matter of crimes against humanity. Accompanying the Treaty of Lausanne was a Declaration of Amnesty for all offenses committed between 1914 and 1922.<sup>33</sup> The very fact there was an amnesty provision implied that there were offenses to be amnestied. But that is as far as the Treaty of Lausanne and Declaration of Amnesty went. They did not state exactly what offenses were being amnestied.<sup>34</sup>

### B. *World War II: Charter of the Nuremberg Tribunal*

That is where matters sat until after World War II and the establishment of the Nuremberg Tribunal (the "Tribunal").<sup>35</sup> But that is not all that can be said about the existence of crimes against humanity before World War II. The Charter of the Nuremberg Tribunal (the "Charter" or the "1945 Charter"), which empowers the Tribunal to try crimes against humanity, defines them as "inhumane acts committed against any civilian population, before or during the war."<sup>36</sup> According to the Charter, an act did not have to be committed during the war to be a crime against humanity.<sup>37</sup>

The Charter also required that the crime have been com-

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32. Treaty of Peace with Turkey, and Other Instruments, signed at Lausanne, July 24, 1923, together with Agreements between Greece and Turkey signed on January 30, 1923, and Subsidiary Documents forming part of The Turkish Peace Settlement, U.K.T.S. No. 16 (1923) (Cmd. 1929) [hereinafter Treaty of Lausanne].

33. *Id.* part VIII, at 191-95.

34. *Id.* part VIII, § III, at 193. The Treaty of Lausanne provided that "[f]ull and complete amnesty shall be respectively granted by the Turkish Government and by the Greek Government for all crimes or offences committed during the same period which were evidently connected with the political events which have taken place during that period." *Id.*

35. Agreement for the Prosecution of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 1, 59 Stat. 1544, 82 U.N.T.S. 279 (1951) [hereinafter London Agreement].

36. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284 (hereinafter Charter). The Charter defines "crimes against humanity" as follows: "namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." *Id.* art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

37. *Id.*

mitted "in execution of or in connection with any crime within the jurisdiction of the Tribunal."<sup>38</sup> The other crimes within the jurisdiction of the Tribunal were war crimes<sup>39</sup> and crimes against peace.<sup>40</sup> It is theoretically possible that a crime against humanity could be committed before the war and still be committed in connection with a war crime or a crime against peace. However, practically, very few crimes against humanity would meet that description.

In fact, there were some accused at Nuremberg who were also convicted of crimes against humanity committed before World War II.<sup>41</sup> There was the case of Streicher for crimes against Jews and humanity.<sup>42</sup> There was also the case of Von Schirach and Seyss-Inquart, convicted for crimes against humanity committed in connection with the annexation of Austria, itself a crime against peace.<sup>43</sup> There was also the case of Frick and Von Neurath, convicted of crimes against humanity committed in Czechoslovakia.<sup>44</sup> However, no Nuremberg defendant was convicted only of crimes against humanity committed before the war began.

The Nuremberg Tribunal stated that "[t]he Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation."<sup>45</sup> In particular, the Tribunal viewed the power to punish crimes against humanity committed before World War II as an

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38. *Id.*

39. *Id.* art. 6(b), 59 Stat. at 1547, 82 U.N.T.S. at 288. The Charter defines "war crimes" as follows: "namely, violations of the laws or customs of war. Such violation shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." *Id.*

40. *Id.* art. 6(a), 59 Stat. at 1547, 82 U.N.T.S. at 288. The Charter defines "crimes against peace" as follows: "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." *Id.*

41. Schwelb, *supra* note 3, at 205.

42. International Military Tribunal at Nuremberg, Oct. 1, 1946, 41 AM. J. INT'L L. 172, 293-96 (Judgment and Sentences) (1947).

43. *Id.* at 309-11, 318-21.

44. *Id.* at 291-93, 324-26.

45. *Id.* at 216.

expression of international law as it existed on August 8, 1945, the date of the Charter.<sup>46</sup>

One year later, in 1946, the United Nations General Assembly adopted without dissent a resolution in which it reaffirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.<sup>47</sup> In particular, it can be said that the General Assembly reaffirmed the principle that crimes against humanity were crimes at international law before World War II.<sup>48</sup>

## II. *RECOGNITION OF CRIMES AGAINST HUMANITY IN SOURCES OF INTERNATIONAL LAW*

If crimes against humanity were crimes at international law before World War II, what was the source of this international law? The Statute of the International Court of Justice (the "ICJ" Statute) sets out five sources: treaties, customs, judicial decisions, and the teachings of the most highly qualified publicists, and general principles of law recognized by civilized nations.<sup>49</sup>

### A. *Treaties*

Before World War II, there was very little in treaty law about crimes against humanity. The First Hague Convention of 1907, concerning the laws and customs of war on land, in its preamble stated that "the inhabitants and the belligerents shall remain under the protection of and subject to the principles of the laws of nations, as established by the usages prevailing among civilized nations, by the laws of humanity and by the demands of public conscience."<sup>50</sup> In addition, there was the Treaty of Sèvres, but as stated earlier, it was never ratified.<sup>51</sup>

After World War II came the London Agreement of August 8, 1945 between the United States, France, the United

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46. *Id.*

47. G.A. Res. 95 (I), U.N. Doc. A/64/Add.1 (1946); see 2 OPPENHEIM, *INTERNATIONAL LAW* 582 (H. Lauterpacht, 7th ed. 1952).

48. G.A. Res. 95(1), U.N. Doc. A/64/Add.1 (1946).

49. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, T.S. No. 995, at 25, 30 [hereinafter ICJ Statute].

50. Hague Convention of 1907 Respecting Law of War on Land, Oct. 10, 1908, Preamble, 36 U.S.T. 860, T.S. No. 9.

51. Schwelb, *supra* note 3, at 182.

Kingdom, and the Soviet Union, to which the Charter of the Nuremberg Tribunal was annexed. It provided that any member of the United Nations may adhere to the Agreement.<sup>52</sup> Nineteen governments availed themselves of the opportunity.<sup>53</sup> The twenty-three states party to the London Agreement can be taken to have accepted, by treaty, that crimes against humanity were crimes at international law before World War II.<sup>54</sup>

### B. Custom

Custom, as a source of international law, is defined as a general practice that is accepted as law.<sup>55</sup> One cannot say that before World War II there was a general practice, accepted as law, of prosecuting persons for crimes against humanity. On the contrary, crimes against humanity were not prosecuted at all.

However, after World War II, the custom reversed itself. There developed a practice, at the war crimes trials, of prosecuting those who committed crimes against humanity before World War II. That practice was accepted as law, as witnessed by the statement of the Nuremberg Tribunal and the United Nations General Assembly resolution.<sup>56</sup>

There are two comments to be made about the custom that developed. First, the custom was limited to crimes committed in execution of or in connection with war crimes or crimes against peace. Even the Treaty of Sèvres referred only to crimes committed during World War I.<sup>57</sup> There was nothing to indicate, either in custom before World War II, or as it developed later, that crimes against humanity committed with-

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52. See London Agreement, *supra* note 35, art. 5, 59 Stat. 1544, 1545, 82 U.N.T.S. 279, 282.

53. See London Agreement, *supra* note 35, 82 U.N.T.S. at 280 n.1. The nineteen governments that adhered to the London Agreement were: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, Yugoslavia. *Id.*

54. In addition to the nineteen governments that adhered to the London Agreement, France, the Soviet Union, the United Kingdom, and the United States were signatories. *Id.*

55. ICJ Statute, *supra* note 49, art. 38, 59 Stat. at 1060, T.S. No. 995 at 30.

56. See *supra* notes 45, 47.

57. See Treaty of Sèvres, *supra* note 19, art. 230, U.K.T.S. No. 11 (1920), at 51.

out connection with war crimes or crimes against peace were crimes at international law.

Second, the development was retrospective. After the war, nations viewed certain acts before the war as crimes against humanity. Custom alone, however, did not provide the legal basis for such prosecutions where the acts in question were not recognized as crimes before World War II.

### *C. Judicial Decisions*

There are also judicial decisions, another subsidiary source of international law, that indicate that certain acts or omissions constitute crimes against humanity. For example, in the *Corfu Channel Case*,<sup>58</sup> the International Court of Justice stated that the obligations of Albania to notify others of a mine field in its waters was based on certain general and well recognized principles. One of these principles was "elementary considerations of humanity, even more exacting in peace than in war."<sup>59</sup>

### *D. Qualified Publicists*

It should be recognized that a number of the "most highly qualified publicists"—yet another source of international law—viewed crimes against humanity as an expression of the general principles of law recognized by civilized nations. For instance, Lord Wright answered the objection of the U.S. members who dissented in the Report of the Commission of Fifteen on the ground that the doctrine of crimes against humanity was too uncertain a concept.<sup>60</sup> Wright wrote that it might equally be said that equity or negligence are too indeterminate to constitute legal concepts, but we well know they have established themselves as regular components of our legal system.<sup>61</sup> He added, "If these elastic standards are of as wide utility as they have proved to be there is no reason why the doctrine of crimes against humanity should not be equally valid and valuable in International Law."<sup>62</sup>

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58. *Corfu Channel Case (Albania v. U.K.)*, 1949 I.C.J. 4 (Judgment of Apr. 9).

59. *Id.* at 22.

60. Wright, *War Crimes Under International Law*, L.Q. REV. 40 (1946).

61. *Id.* at 48-49.

62. *Id.* at 49.

Egon Schwelb, another writer, wrote that under the 1945 Charter, crimes against humanity is a technical term.<sup>63</sup> He said "to come under the notion, a certain act must be universally recognized as a crime under the penal law of civilized nations."<sup>64</sup> Schwelb was taking up the point Wright had raised, that it was possible to give content and certainty to the notion of crimes against humanity. Schwelb's argument not only gives the notion of crimes against humanity certainty, it gives it legal stature as well.

Similarly, Hersh Lauterpacht was concerned by this issue. He wrote that the 1945 Charter presented no innovation when it decreed individual responsibility for crimes against humanity.<sup>65</sup> He added, "[f]or the laws of humanity, which are not dependent upon positive enactment, are binding, by their very nature, upon human beings as such."<sup>66</sup>

### E. *General Principles*

Finally, the ICJ Statute cites to general principles as a source of international law. International agreements relating to crimes against humanity refer specifically to general principles in their texts.<sup>67</sup> This vital source of international law has been relied upon although exact definition of the term "general principles of international law" has been subject to debate.

#### 1. International Agreements and General Principles of Law

Before discussing the controversy surrounding the exact definition of the term "general principles of international law," those international agreements citing general principles should be examined. Although the Charter of the Nuremburg Tribunal applied to acts committed before adoption of the Charter, the Charter did not create a new crime. Rather, the Charter merely articulated an existing crime. The point is made by both the European Convention on Human Rights (the

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63. Schwelb, *supra* note 3, at 180.

64. *Id.* at 197.

65. 1 L. OPPENHEIM, INTERNATIONAL LAW 341 (H. Lauterpacht 8th ed 1955).

66. *Id.*

67. See *infra* notes 68-79 and accompanying text.

"European Convention")<sup>68</sup> and the International Covenant on Civil and Political Rights (the "International Covenant")<sup>69</sup> through the invocation of general principles that recognize certain acts committed before the adoption of either instrument as crimes against humanity. Both the European Convention and the International Covenant, however, prohibit retroactive punishment for an act which was not an offense under national or international law at the time it was committed.<sup>70</sup> Both instruments add that the prohibition shall not prevent punishment for an act which, at the time it was committed, was criminal according to general principles of law.<sup>71</sup> The European Convention defines general principles of law as those recognized by civilized nations<sup>72</sup> whereas the International Covenant refers to general principles of law as those recognized by the community of nations.<sup>73</sup>

The *travaux préparatoires* of these instruments show that the drafters had prepared these provisions with the World War II crimes specifically in mind.<sup>74</sup> The summary records of the Third Committee of the General Assembly showed that state representatives, when discussing this language of the International Covenant, expressed the view that it would eliminate any doubts regarding the legality of the judgment rendered at Nuremberg.<sup>75</sup>

Because general principles of law are recognized as a source of international law, it may seem superfluous to have added this express saving provision in the European Conven-

68. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 7(2), 213 U.N.T.S. 221, 230 [hereinafter European Convention].

69. International Covenant on Civil and Political Rights, 1966, *opened for signature* Dec. 16, 1966, art. 15(1), 999 U.N.T.S. 171, 177 [hereinafter International Covenant].

70. See European Convention, *supra* note 68, art. 7(1), 213 U.N.T.S. at 228; International Covenant, *supra* note 69, art. 15(1), 999 U.N.T.S. at 177.

71. See European Convention, *supra* note 68, art. 7(2), 213 U.N.T.S. at 230; International Covenant, *supra* note 69, art. 15(2), 999 U.N.T.S. at 177.

72. European Convention, *supra* note 68, art. 7(2), 213 U.N.T.S. at 230.

73. See International Covenant, *supra* note 69, art. 15(2), 999 U.N.T.S. at 177.

74. See Commission on Human Rights, A/2929 ch. VI, § 96, *reprinted in* BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 330 (1987).

75. See Third Committee, 15th Session (1960), A/4625, § 16, *reprinted in* BOSSUYT, *supra* note 74, at 331-32.

tion and the International Covenant. Indeed, that was a point of view expressed by some state representatives, when the international instruments were drafted.<sup>76</sup> However, to make matters perfectly clear that the judgments at Nuremberg were valid, the separate saving provision was added.

The International Covenant provision does not refer only to crimes against humanity punished at Nuremberg; instead, it refers to all the general principles of law recognized by the community of nations.<sup>77</sup> In particular, Nuremberg limited crimes against humanity to those committed in execution of or in connection with crimes against peace or war crimes. One can say, with relative certainty, because of Nuremberg and the United Nations General Assembly affirming resolution, that those crimes were crimes according to the general principles of law recognized by the community of nations. But what about crimes against humanity committed before World War II but not in execution of or in connection with crimes against peace or war crimes? Are they also criminal according to the general principles of law recognized by the community of nations?

Deciding what is criminal according to the general principles of law recognized by the community of nations is a comparative law undertaking.<sup>78</sup> This leads to the conclusion that deciding what was criminal before World War II adds a historical dimension to such an undertaking.

While for some crimes, that sort of study might be an arduous and prolonged task, for crimes against humanity, it is immediately obvious what that study should yield. Before World War II, the community of nations generally recognized as criminal acts: "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population . . . [and] persecutions on political, racial or religious grounds."<sup>79</sup>

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76. See Commission on Human Rights, A/2929, chap. VI, § 96, *reprinted in* BOS-SUYT, *supra* note 74, at 330.

77. International Covenant, *supra* note 69, art. 15(2), 999 U.N.T.S. at 177.

78. See Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations* (1957), 51 AM. J. INT'L L. 734; see also Schwarzenberger, *Foreword to* B. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* xii (1987).

79. See Charter, *supra* note 36, art. 6(c), 59 Stat. 1546, 1547, 82 U.N.T.S. 284, 288.



## 2. The Meaning of General Principles of Law

The notion that crimes against humanity were crimes at international law before World War II is superficially puzzling because the international legal literature at the time contained no such statement of a crime. Part of the explanation for such confusion was uncertainty at the time as to whether general principles of law were part of international law and what the phrase "general principles of law" meant.

The debate over whether general principles of law were part of international law was not authoritatively resolved until 1945 when the International Court of Justice (the "ICJ") was established.<sup>80</sup> The statute pursuant to which the ICJ was created included general principles of law as a source on which the court could draw.<sup>81</sup> Hersch Lauterpacht has written that the inclusion of general principles as a source of international law in the statute of the court was an important landmark in international law.<sup>82</sup>

The debate over what "general principles" means has subsided. Some writers, such as Grigory I. Tunkin of the Soviet Union, have taken the point of view that general principles of law means general principles of international law.<sup>83</sup> The prevailing opinion is, nonetheless, that general principles of law means general principles of municipal law. That, for instance, is the position accepted by the Supreme Court of Canada.<sup>84</sup> Indeed, the Tunkin position would make the general principles superfluous as a source of law, for general principles of international law are already conventional or customary international law.

Another explanation for the ambiguity surrounding general principles of law is that no procedure existed before World War II to prosecute and punish crimes against humanity. Not only was there no international procedure, but neither was there a domestic procedure in any state for the prosecution of such crimes. Although the punishment of the crimes

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80. See U.N. CHARTER arts. 92-96.

81. See ICJ Statute, *supra* note 49, art. 38, 59 Stat. 1055, 1060, T.S. No. 995, at 25, 30.

82. I L. OPPENHEIM, *supra* note 65, at 29-30.

83. Tunkin, *Co-Existence and International Law*, 95 RECUEIL DES COURS 1 (1958).

84. In the Matter of Section 55 of the Supreme Court Act, R.S.C. 1970, ch. S-19, as amended, 1 S.C.R. 86, 114 (1984).

may have been unprecedented until the Nuremburg Tribunal, the absence of a procedure to punish a crime does not mean that the crime does not exist. It is understandable, however, that there was no reference before World War II to crimes against humanity, when such crimes were not being prosecuted at the time.

Unlike the ICJ, the Nuremburg Tribunal was not given the authority to apply general principles of law. The authority of the Nuremburg Tribunal was specific and limited to war crimes, crimes against peace, and crimes against humanity.<sup>85</sup>

It is unlikely that any tribunal will be given the power to punish international crimes without specifying what those crimes are. When a tribunal is given power to punish crimes against humanity, crimes against humanity are specifically mentioned. General principles of law are not to determine the content of the crime, but only to determine whether the punishment of the crime is justifiable.

### III. CANADIAN ASSERTION OF JURISDICTION OVER CRIMES AGAINST HUMANITY

An example of a tribunal given power to punish crimes against humanity can be found in Canada, where Canadian law allows for the assertion of jurisdiction over such international crimes.<sup>86</sup> The act must be criminal according to conventional or customary international law or criminal according to the general principles of law recognized by the community of nations at the time it was committed.<sup>87</sup> There must also have been jurisdiction, at international law, over the crime at the time it was committed.<sup>88</sup> General principles, however, do not define the elements of the crime. Canada has specifically legislated the definition of "crime against humanity."<sup>89</sup>

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85. Charter, *supra* note 36, art. 6, 59 Stat. 1546, 1547, 82 U.N.T.S. 284, 288.

86. 1987 Can. Stat. ch. 37, § 1(1).

87. *Id.*

88. *Id.*

89. *See id.* § 1(1). Under Canadian law, "crime against humanity" means: murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal ac-

The Canadian law contains a legal curiosity that is unlikely to be found anywhere else. It not only requires that the acts be crimes at international law when committed, so that the principle against retroactivity will not be violated;<sup>90</sup> it also requires, for no apparent reason, that there be jurisdiction at international law when the act is committed.<sup>91</sup> The principle against retroactivity dictates that a person not be punished for an act that was not an offense at the time committed. Moreover, the principle against retroactivity does not require that a person who commits a crime, at a place where it was a crime, be free from punishment because he managed to escape, at the time, to a place that then had no jurisdiction over the particular crime. Yet, in contrast to this principle, that is what Canadian law requires.

The Canadian law puts the courts back into a historical legal search not only for the general principles of the community of nations, but also for universality of jurisdiction. Canadian courts must ask themselves not only whether crimes against humanity were criminal according to the general principles of law recognized by the community of nations before World War II, but also whether there was universal jurisdiction over crimes against humanity before World War II.

The issue of universal jurisdiction is not easily resolved because there were no prosecutions for crimes against humanity before World War II. Although prosecutions after World War II for crimes against humanity have contained statements that these crimes were crimes at international law before World War II, no tribunal has stated that there was universal jurisdiction over these crimes before World War II.

The issue can, nonetheless, be resolved by resorting to general rules that were recognized before World War II. There are two that are relevant here. The first principle is that a state has jurisdiction with respect to any crime committed outside its territory by an alien now within its territory, if the act is a crime in the place where it was committed, if surrender of the alien for prosecution in the place where the offense was

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cording to the general principles of law recognized by the community of nations.

*Id.*

90. *See id.*

91. *See id.*

committed has been offered and remains unaccepted, and if prosecution is not barred by lapse of time in the place where it was committed. That principle is set out as part of a Draft Convention on Jurisdiction with Respect to Crime presented by Harvard Law School.<sup>92</sup>

The second principle is that there is universal jurisdiction over crimes considered dangerous to and attacks upon international order.<sup>93</sup> The nature of the crime justifies the repression of the crime as a matter of international public policy. Because today, there is plenty of specific authority now stating that there is universal jurisdiction over crimes against humanity one may take it a step further and say that there must have been universal jurisdiction over crimes against humanity before World War II, even before any tribunal was competent to order punishment for such crimes. Crimes against humanity were always dangerous to international order. Even before the concept of crimes against humanity had been articulated, there existed a right, at international law, of intervention on grounds of humanity.<sup>94</sup> For example, in 1827, England, France, and Russia intervened to end the atrocities of the Greco-Turkish war.<sup>95</sup> The battle of Navarino also saw the use of force by the community of nations in the interest of humanity.<sup>96</sup> Similarly, there were interventions in 1860 to protect the Christians of Mount Lebanon,<sup>97</sup> in 1878 to secure the deliverance of the Balkan states,<sup>98</sup> and in 1896 following massacres in Armenia and Crete.<sup>99</sup> Jurists conceded to the intervening states the right to protect the principles of a common humanity.

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92. Draft Convention on Jurisdiction with Respect to Crime, art. 10(a), 29 AM. J. INT'L L. 439, 440-41 (Supp. 1935).

93. F.A. MANN, *The Doctrine of Jurisdiction*, in STUDIES IN INTERNATIONAL LAW 1, 81 (1973); see I BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 304 (3rd ed. 1983).

94. See FENWICK, INTERNATIONAL LAW 287 (4th ed. 1965); see also L. KUPER, THE PREVENTION OF GENOCIDE 19-20 (1981).

95. Treaty for the Pacification of Greece signed London, July 6, 1827, State Papers 14:632, Martens N.R., 7:282, cited in Catalogue of Treaties 1814-1918, at 26 (1964); see C.M. WOODHOUSE, A SHORT HISTORY OF MODERN GREECE 144-49 (1968).

96. See FENWICK, *supra* note 94, at 287; see also C.M. WOODHOUSE, *supra* note 95.

97. See FENWICK, *supra* note 94, at 287.

98. See Hovannisian, *The Historical Dimensions of the Armenian Question, 1879-1923*, in THE ARMENIAN GENOCIDE IN PERSPECTIVE 22-23 (1986); see also C.M. WOODHOUSE, *supra* note 95, at 180-81.

99. See C.M. WOODHOUSE, *supra* note 95, at 182; Hovannisian, *supra* note 98, at 24-25; see also FENWICK, *supra* note 94.

Accordingly, it is clear not only that Canada can now prosecute crimes against humanity committed before World War II but also that any state before World War II could have prosecuted individuals found in that state for crimes against humanity on the basis of universal jurisdiction.

### *CONCLUSION*

Adolf Hitler is reported to have said, "[w]ho does now remember the Armenians."<sup>100</sup> Because the perpetrators of the Armenian genocide were not prosecuted, the Nazi-organized Holocaust against the Jews became possible. There is a direct linkage between the failure to prosecute the crimes against humanity before World War II and their commission during World War II.

This failure did not occur because there was no offense or because there was no jurisdiction. Both existed, and still the prosecutions did not occur. This reluctance to act, in spite of the offense and in spite of the jurisdiction, made the Nazis more brazen and the Holocaust more likely.

Nothing emboldens a criminal so much as the knowledge he can get away with the crime. That was the message the failure to prosecute for the Armenian massacre gave to the Nazis. We ignore the lesson of the Holocaust at our peril. For unless we want to repeat the mistakes of history, we must prosecute Nazi mass murderers in our midst.

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100. See C. WALKER, *ARMENIA: THE SURVIVAL OF A NATION* 362 (1980).